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Unlocking the Eighth Amendment’s Power to Make Innocence a Constitutional Claim

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Unlocking the Eighth Amendment’s Power to Make Innocence a Constitutional Claim: The ‘Objective’ Views of State Legislators

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In a long series of death penalty and other cases, the U.S. Supreme Court has repeatedly ruled that state legislative action shapes the operative meaning of the Eighth Amendment.¹ In short, if a particular punishment is acceptable to state legislators then it does not offend our “evolving standards of decency,”² and is therefore not cruel and unusual. If, however, legislators have deemed a punishment unacceptable, it loses our evolving society’s imprimatur, and therefore violates the Eighth Amendment.³

Meanwhile, in a second series of cases, the Court has failed to identify a constitutional bar to executing an innocent person.⁴ Rather, the Court has held that a

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³ This is, as critics and several justices have asserted, a rather circular proposition, in which whatever states choose to do is acceptable because they choose to do it. See, for example, David Niven, Jeremy Zilber, and Kenneth Miller, A ‘Feeble Effort to Fabricate National Consensus’ The Supreme Court’s Measurement of Current Social Attitudes 33 Northern Kentucky Law Review 83 (2006).
claim of innocence, indeed evidence of innocence, is insufficient to warrant remedy without an identified reversible error.⁵

Here I assert that the Court need only apply the first line of cases to the second to produce a constitutional bar to executing the innocent. That is, my analysis of state legislation and of the survey responses of state legislators reveals an overwhelming aversion to executing the innocent. Thus, as the Court’s proxy for society’s conscience, legislators imbue the Eighth Amendment with the unmistakable power, and the Court with the clear duty, to prevent the execution of an innocent person.

The paper proceeds as follows. Part I demonstrates that the Court has deemed legislative action “objective” evidence of the Eighth Amendment’s meaning. Part II notes the Court’s position that innocence is not an actionable constitutional basis for appeal. Part III describes a review of state capital punishment legislation and the results of a survey of state legislators. Part IV asserts that the legislation and the responses of state legislators represent the missing cog that animates the Eighth Amendment and renders innocence a constitutional claim.

Part I

While the Court’s holding that the Eighth Amendment reflects our society’s “evolving standards of decency”⁶ remains a controversial assertion to some Justices, the means of measuring society’s standards has produced an enduring consensus.

In Coker v. Georgia (1977), and subsequent cases, the Court has repeatedly held that society’s standards of decency must be measured with “objective factors,” and that

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chief among those factors is state legislation action. In *Coker* the Court asserted that the “public judgment as to the acceptability” of a punishment is “evidenced by the... legislative reaction in a large majority of states.”

“Legislation...is an objective indicator of contemporary values upon which we can rely,” the Court noted in *Penry v. Lynaugh* (1989). Indeed, “national consensus” can be found by scrutinizing “the operative acts (laws and the application of laws) that the people have approved.”

The Court has not only ceded this particular judgment to state legislators, it has specifically rendered its own views irrelevant because it “will rarely if ever be the case that the Members of this Court will have a better sense of the evolution in views of the American people than do their elected representatives.”

**Part II**

Attorneys representing Leonel Herrera argued that the Eighth Amendment’s prohibition against cruel and unusual punishment prevents the execution of a potentially innocent person, and that he was owed the chance to at least present his new evidence before a judge. The Court, as it had in numerous death penalty cases before, noted that it exercises “substantial deference to legislative judgments in this area.” However, rather than consider the degree to which legislators would accept the prospect of a potentially innocent defendant on death row, the Court limited its attention to the procedural rules in place.

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8 Id. at 593
13 Id. at 407.
Thus, without aid of any legislative perspective on the issue at hand, the Court found that actual innocence was not grounds for federal relief and that defendants have no constitutional right to make use of newly available evidence that casts doubt on a conviction.

Writing for the majority, Chief Justice Rehnquist asserted that “claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding.”14 Innocence, then, “is not itself a constitutional claim” but rather a “gateway” to having a “constitutional claim considered on its merits.”15 Emphasizing this point, the Court noted that “this rule is grounded in the principle that federal habeas courts sit to ensure that individuals are not imprisoned in violation of the Constitution – not to correct errors of fact” (emphasis added).16

In other words, an error of fact – even an error of fact pertaining to an actually innocent defendant in a capital case – is not a matter of Constitutional concern. It is, as Justice Scalia explained in his Herrera concurrence, “an unhappy truth that not every problem was meant to be solved by the United States Constitution, nor can be.”17

14 Id. at 400. In a concurring opinion in Herrera, Scalia went even farther: “there is no basis in text, tradition, or even in contemporary practice (if that were enough) for finding in the Constitution a right to demand judicial consideration of newly discovered evidence of innocence brought forward after conviction” (at 427). In dissent, Blackmun wrote that the prospect of executing an innocent person was “shocking to the conscience” (at 430). Scalia replied with unalloyed sarcasm, “If the system that has been in place for 200 years (and remains widely approved) ‘shock[s]’ the dissenters’ consciences perhaps they should doubt the calibration of their consciences, or, better still, the usefulness of ‘conscience shocking’ as a legal test” (at 428).
15 Id. at 393.
16 Id. at 400.
17 Id. at 428.
Scholars have raised concerns that the Herrera decision – and subsequent affirmations of the principle that innocence is not a constitutional claim\(^\text{18}\) – elevates the achievement of finality over the pursuit of justice.\(^\text{19}\) Indeed, the Court in Herrera explicitly warns that “few rulings would be more disruptive of our federal system than to provide for federal habeas review of freestanding claims of actual innocence”.\(^\text{20}\)

The window for death penalty appeals – whether grounded in innocence or any other grounds – would close even tighter with the passage in 1996 of the Anti-Terrorism and Effective Death Penalty Act. For those appealing a capital sentence, AEDPA created new time limits, procedural limits, limited the number of petitions, limited grounds for habeas relief, and mandated that federal courts operate with deference to state courts.\(^\text{21}\)

\(^{18}\) House v Bell 547 U.S. 518 (2006), District Attorney’s Office for the Third Judicial District v. Osborne, 557 U.S. 52 (2009), in re: Davis 557 U.S. (2009). In Bell, the Court set an all but impossible to meet evidentiary standard required to assert innocence, then affirmed that if that standard is met, the appellee must still advance a constitutional claim. In Osborne, the Court found that a defendant has no right to access DNA evidence in the state’s possession that could prove his innocence. In Davis, the Court demonstrated some unease at the prospect of a potentially innocent person facing execution. Troy Davis, whose appeal drew international attention and support from array of strange political bedfellows including President Jimmy Carter, Representative Bob Barr, Nobel Laureate Desmond Tutu, and former FBI director William Sessions, was granted an evidentiary hearing by the Court. However, in Davis, and in other capital cases in which innocence is asserted, the Court has failed to articulate a constitutional principle that bars the execution of the innocent and grants associated rights to appellees. In that regard, Lott labels the Davis decision “hollow,” “[Joshua Lott, The End of Innocence? Federal Habeas Corpus Law After In re Davis, 27 Georgia State University Law Review 443 (2010) at 446], see also Lee Kovarsky, Death Ineligibility and Habeas Corpus, 95 CORNELL LAW REVIEW 329 (2009-2010), and Jacobs, The Constitutionality of Collateral Post-Conviction Claims.

\(^{19}\) See Jennifer Culbert, Dead Certainty: The Death Penalty and the Problem of Judgment, Stanford, CA: Stanford University Press (2008), and Janet Hoefel, The Roberts Court’s Failed Innocence Project, 85 CHICAGO-KENT LAW REVIEW 43 (2010). Jacobs encapsulates a widely-held scholarly view: “There are certainly wise and just reasons to limit the availability of habeas review, such as finality, comity, and the like, but to suggest that the Constitution does not recognize actual innocence as a valid claim on habeas review is to circumscribe the essential mandate of the Eighth Amendment— that the state respect human dignity when it punishes” (Jacobs, The Constitutionality of Collateral Post-Conviction Claims, at 492).

\(^{20}\) Herrera at 401. The Herrera case would resurface as an issue at the confirmation hearings for chief justice nominee John Roberts. Roberts faced a series of questions about his brief in support of the prosecution in the Herrera case. Senator Leahy and Senator Durbin both pressed Roberts to explain whether the Constitution permits the execution of an innocent person. Even when repeatedly challenged, Roberts refuse to deny the assertion.

\(^{21}\) Justice Stevens, in his In re Davis concurrence, argues that AEDPA may be unconstitutional as it applies to the innocent on death row. Numerous scholars have articulated concerns regarding AEDPA, suggesting that it is productive mainly of injustice. See Krystal Moore, Is Saving an Innocent Man a
The combined weight of the Court’s rulings and the implementation of the AEDPA provide strong foundation to Justice Scalia’s unremitting assertion that “this Court has *never* held that the Constitution forbids the execution of a convicted defendant who has had a full and fair trial but is later able to convince a habeas court that he is ‘actually’ innocent.”

To scholars, the Court’s rulings on innocence represent a rather callous limitation on the practical value of the Eighth Amendment. Under this formulation, the Eighth Amendment protects procedural integrity while offering nothing more than indifference to personal injustice.

This apparent “tension between procedure and substance” could potentially be resolved by turning to the Court’s designated arbiters of the Eighth Amendment, state legislators. Logically, the Court must apply the same state legislative test of the Eighth Amendment here that the Court has used to determine if rapists can be executed, if the mentally retarded can be executed, and if minors can be executed.

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24 While the court has averred that commutation offers protection against any potential miscarriage of justice in capital cases, scholars warn that the practical political costs of leniency as too much to bear for most governors. See Victoria Palacios, *Faith in Fantasy: The Supreme Court’s Reliance on Commutation to Ensure Justice in Death Penalty Cases*, 49 VANDERBILT LAW REVIEW 311 (1996).
Part III

Researchers have studied state legislators’ death penalty policy positions and policy making priorities from a number of angles. Legislators have been found – in the main – to be supportive of the death penalty and to align themselves on the issue in similar proportion to the general public.\textsuperscript{29} However, legislators have also demonstrated a susceptibility to alternatives and counter arguments on the death penalty.\textsuperscript{30} What has not been established in previous work is the degree to which innocence issues affect legislators’ considerations.

To assess state legislators’ beliefs about innocence in death penalty cases, I have reviewed capital punishment statutes in the 33 states with the death penalty and conducted a survey of legislators to record their personal views on the matter.

Legislation

A review of capital punishment statutes in the states that impose death sentences reveals unanimity in the intention of these states’ legislators to apply the sentence only to those who are factually guilty. Indeed, of the 33 death penalty states, 33 death penalty statutes permit a sentence of death only for the \textit{commission} of an act of murder, the \textit{perpetration} of the act, or for \textit{killing} another. No state permits a capital sentence based solely on a \textit{conviction} of murder.

\textsuperscript{28} \textit{Roper v. Simmons} 543 U.S. 551 (2005).
| Death Penalty States Using “Committed” Language | 25 | AL: “committed by the defendant...”  
AZ: “defendant committed the offense...”  
AR: “The person commits...”  
CO “Murder committed by person...”  
DE “The murder was committed...”  
FL “The defendant committed the murder...”  
GA “The murder was committed...”  
ID “murder committed by a person...”  
KY “The offense of murder or kidnapping was committed by a person with...”  
LA “The killing was committed...”  
MD “a deliberate, premeditated, and willful killing; committed by...”  
MO “The offender committed the offense of murder...”  
MT “The offense was deliberate homicide and was committed by...”  
NV “murder was committed by...”  
OH “The murder was committed...”  
OK “The murder was committed...”  
OR “The defendant committed the murder...”  
PA “The murder was committed...”  
SC “The capital offense was committed...”  
SD “The capital offense was committed...”  
TN “The murder was committed...”  
TX “The capital offense was committed...”  
UT “The murder was committed...”  
WA “The defendant committed murder...”  
WY “The murder was committed...”  
| Death Penalty States Using “Perpetrated” Language | 3 | CA “murder which is perpetrated by means of”  
MS “Murder which is perpetrated by...”  
NC “A murder which shall be perpetrated by...”  
| Death Penalty States Using “Killing”/“Causes the Death” Language | 4 | IN “A person who: knowingly or intentionally kills another human being...”  
KS “Capital murder is the Intentional and premeditated killing...”  
NE “he or she kills another person...”  
NH “A person is guilty of capital murder if he knowingly causes the death of...”  
VA “willful, deliberate, and premieditated killing...”  
| States without Death Penalty | 17 |  
| States Allowing Capital Sentence for “Conviction” of Offense | 0 |
Table 1 encapsulates this requirement based on the text of the 33 capital statutes. Most typical is language requiring that the defendant have “committed” the act. Among the 25 states with similar language is Indiana, which provides for a death sentence if “the defendant committed the murder by intentionally killing the victim while committing or attempting to commit any of the following,” and then enumerates a list that includes arson, burglary, rape, etc. Three states substitute the word “perpetrated” for “committed.” The remaining four death penalty states include language directly referencing the act of killing. Typical formulations include Virginia’s approach which makes a death sentence available for the “willful, deliberate, and premeditated killing” of several categories of victims including “law enforcement officers,” “more than one person,” “any person in the commission of a robbery.”

A handful of states do make at least some mention of imposing capital sentences on those “convicted” of murder. However, in every one of these instances the law explicitly defines the aggravating circumstances necessary to sustain a death sentence in terms of the commission of the act.

All told, legislators in all 50 states have set their states’ statutes in opposition to executing a defendant merely upon conviction for a capital crime. That is, 17 states do not impose the death penalty and all 33 death penalty states require the actual commission of the charged act, rather than a mere conviction.

Legislative revulsion to seeing capital sentences imposed on the innocent is apparent in other legislative efforts as well. Legislators in 48 of the 50 states, and 32 out of the 33 death penalty states, have recently passed a version of a DNA evidence access
bill, providing some measure of post-conviction access to DNA evidence in the hopes of preventing the incarceration or execution of an innocent defendant.

Meanwhile, Nebraska’s unicameral legislature so abhors the possibility of executing an innocent person that it has elevated the act of perjury in a capital case that results in the execution of an innocent person into a capital offense itself.

Remorse over punishing the innocent has inspired numerous other legislative responses including one Pennsylvania state representative’s bill that would compensate victims of wrongful conviction at a rate of $141 per day of incarceration – a sum that happens to be the per diem rate paid to state legislators.

*Survey Responses*

While sentencing statutes suggest state legislators unambiguously intend to reserve the death penalty exclusively for those who committed the offense at hand, the degree to which legislators abhor the prospect of sending an innocent person to death row can most clearly be documented by simply asking them.

Fortuitously, to a surprising degree, state legislators have proven themselves accessible to scholarly inquiries. 31 Scores of studies have been published based largely on the willingness of legislators to share their views on politics and process. 32 Here I construct two samples of state legislators to inquire about innocence and the death penalty.

In conventional social science research, a survey of legislators might target a random sample in order to provide a fair representation of legislators more generally.

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31 Maestas and her colleagues found more than 14,000 state legislative respondents to scholarly queries in their survey of the literature. See Cherie Maestas, Grant Neeley, and Lilliard Richardson, *The State of Surveying Legislators: Dilemmas and Suggestions* 3 STATE POLITICS AND POLICY QUARTERLY 90 (2003).

32 Id.
However, Justice Scalia and the conservative wing of the Court have boldly claimed that while the Eighth Amendment is defined by state legislators, only the views of legislators from death penalty states are pertinent. That is, for example, when the Court counted up how many states rejected the execution of juveniles, Scalia objected to including states without capital punishment in the tally. As he colorfully explained in his *Roper v. Simmons* (2005) dissent, “Consulting States that bar the death penalty concerning the necessity of making an exception to the penalty for offenders under 18 is rather like including old-order Amishmen in a consumer-preference poll on the electric car. Of course they don’t like it, but that sheds no light whatever on the point at issue.”

To satisfy the preferred methodological standards both of social scientists and of Justice Scalia, here I employ two separate samples. First, I constructed a random sample of state legislators from the 50 states. Second, I constructed what I am calling my Scalia sample by removing members of the random sample who hail from non-death penalty states and replacing them with a random selection of like number from among the 33 death penalty states.

Both samples include a total of 400 legislators. To maximize participation rates (as demonstrated in previous state legislative surveys), legislators were contacted both by phone and email. Members of the sample were first alerted of my interest in speaking to them by email one week before I attempted to reach them by phone to request a brief interview. If a telephone interview could not be arranged, I sent the questions in a

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second email message. Up to five email reminders were then sent if a response was not received.

In total, 287 legislators in the random sample and from 313 from the Scalia sample responded between November 1, 2011 – April 16, 2012. The response rates for the two groups are 71.8% and 78.2% respectively.35

In order to maximize the likelihood of responses, legislators were told that their participation in this study would require no more than five minutes of their time and they were assured that they would not be personally identified. Indeed, the survey itself consisted of only three questions on the death penalty.

Q1

Do you support the continued use of the death penalty in XX state? [Or,
Would you support legislation creating a death penalty in XX state?]

Q2

In your opinion, what is an acceptable error rate when determining the
guilt of defendants facing a potential death sentence?

Q3

Do you believe it is permissible under the Constitution to execute someone if
there are doubts regarding his guilt?

35 These response rates are not inconsistent with the results other researchers have achieved when contacting legislators on policy-centered topics. For example, in a study of legislators’ perceptions of public views on the death penalty, McGarrell and Sandys reached 75% of their sample (McGarrell Marla Sandys, The Misperception of Public Opinion). In a study of views on tobacco sales restrictions, Gottlieb and his colleagues reached 84% of their sample (Gottlieb et al., State Legislators’ Beliefs).
The survey results paint a picture of legislators’ views that aligns quite closely with the text of state statues. That is, they do not intend to impose death sentences on innocent defendants and are, in point of fact, repulsed by the notion.

Both the overall sample and the Scalia sample report majority support for the death penalty. The overall sample – asked whether they support maintaining the death penalty in their state (or creating a death penalty if not currently in place) – responded with 58% in support. The Scalia sample – drawn exclusively from death penalty states – produced 63% support for the death penalty.

Among two samples with no shortage of support for the death penalty, however, there was no support for executing the innocent.

When asked what the acceptable error rate is for imposing death sentences, the mean response for the overall sample was .02. That is, one error per 5000 cases. Moreover, the modal response, in fact the near universal response, was zero.

**Table 2**

<table>
<thead>
<tr>
<th>Survey of State Legislators</th>
<th>Overall Sample (n=287)</th>
<th>Scalia Sample (n=313)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Support the Death Penalty</td>
<td>58% yes</td>
<td>63% yes</td>
</tr>
<tr>
<td>Acceptable Error Rate</td>
<td>.02 mean</td>
<td>.03 mean</td>
</tr>
<tr>
<td></td>
<td>(96% responded: zero/none)</td>
<td>(93% responded: zero/none)</td>
</tr>
<tr>
<td>Constitution Permits Execution with Doubt</td>
<td>95% no</td>
<td>94% no</td>
</tr>
</tbody>
</table>

The Scalia sample was similarly inclined, with a mean response of .03. That equates to 1 error per 3333 cases. Again, the modal response was zero errors.
Asked if the Constitution permits the execution of someone whose guilt is in doubt, the overwhelming majority of legislators in both samples responded negatively.

Many legislators were incredulous that the acceptability of imposing the death sentence on an innocent defendant could even be debated.

*“You can’t unring a bell.”*

*“You see this and you just have to say ‘Whoa.’”*

*“We shouldn’t use it if there is a chance of executing an innocent person.”*

*“Civilized society cannot – should not – accept this.”*

*”What have we gained when we pile a wrong on top of a wrong? Who is served by that? No one is served, not the victim, not society, and surely not the new victim of a bad prosecution.”*

Several legislators were quick to underscore that there is a world of difference between being a supporter of the death penalty and being indifferent to questions of innocence.

*“I’m not soft on crime. But we cannot undo an execution.”*

*“I want to make sure we put the right people to death.”*

*“It would be wrong if we didn’t learn a lesson from these exonerations. We’d be weakening the whole criminal justice system.”*
*“If you do the crime, you do the time. But I am also a firm believer that we must be sure he has done the crime.”

*“I have to be certain, myself, that we’re not taking innocent peoples’ lives. Otherwise, just what are we allowing to happen?”

In sum, state legislators are not sympathetic to the conclusion that the death penalty can be imposed without regard to factual guilt. Rather, they believe (1) that the death penalty should only be imposed on those for whom guilt is not in doubt and (2) that neither they nor the Constitution tolerates errors in capital cases.

Part IV

On its face, this presentation suggests an effort to knock down a straw man. Is there really anyone who would speak up for executing the innocent? Nevertheless, demonstrating that legislators do not think executing an innocent person is acceptable is a vital step toward asserting a constitutional bar to executing the innocent.

The Court has ruled that “actual innocence’ is not itself a constitutional claim” and that state legislative action is a guide to the practical meaning of the Eighth Amendment. Here I contend that legislators definitively reject the legitimacy of imposing capital punishment on innocent defendants – therefore, under the Court’s

36 Though Scalia certainly seems to approach this position when he mocks his colleagues for the “reluctance of the present Court to admit publicly that Our Perfect Constitution lets stand any injustice, much less the execution of an innocent man who has received, though to no avail, all the process that our society has traditionally deemed adequate” (Herrera at 428) (Scalia, concurring). Similarly in Kansas v. Marsh 548 163, 198 U.S. (2006) (Scalia, concurring) Scalia takes aim at those who would hold the capital punishment system to a standard of “100% perfection.”

37 Herrera at 404.
38 Coker at 595.
logic – the Eighth Amendment must be seen as providing constitutional relief against the execution of an innocent defendant. In both the text of enacted legislation and in the words of legislators, mistakes in capital punishment cases are seen as intolerable. Any effort to execute someone based merely on a conviction defies the language, intent, and beliefs of state legislators, and therefore violates the Eighth Amendment.39

While scholars have pointed to the potential of innocence claims and innocence rates to redefine death penalty jurisprudence,40 and have specifically asserted that the intersection of innocence and the Eighth Amendment is where this matter will be settled,41 this analysis represents a unique effort to apply the conclusions of state legislators to the operative meaning of the Eighth Amendment.

Some hail the arrival of the “innocence revolution”42 even as critics43 assert that talk of innocence is nothing more than a workaround intended to advance the abolition of the death penalty. But as Soss, Langbein, Metecko note, “the legal and political viability of capital punishment hinges on both its consequences in practice and meaning

39 Worth noting too is Geimer and Amsterdam’s (1987) finding that the leading factor in whether jurors supported a death sentence was their confidence in the defendant’s guilt. (William Geimer and Jonathan Amersterdam, Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Trials, 15 AMERICAN JOURNAL OF CRIMINAL LAW 1 (1989)). Similarly, Soss, Langbein and Metecko (2003) found support for the death penalty in general varied with the respondent’s confidence that government could correctly identify guilty defendants [Joe Soss, Laura Langbein, and Alan Metelko, Why Do White Americans Support the Death Penalty?, 65 JOURNAL OF POLITICS 397 (2003)].


in the public mind.” More to the point here, the Court defines the ‘public mind’ as the mind of legislators, and those minds support the death penalty only as it is exclusively applied to the factually guilty.

Legislators believe in their own responsibility to limit the death penalty to the factually guilty. And they believe in the Court’s responsibility to do no less. As one legislator put it: “The courts don’t want to hear about a substantial claim of innocence! That’s unacceptable. We’re not racing to churn widgets off an assembly line here. There’s no question more important when we’re imposing a death sentence.”

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44 Soss, Langbein, and Metelko, Why Do White Americans Support the Death Penalty? at 415.